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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES CAROTHERS, Defendant and Appellant.	H040513 (Santa Clara County Super. Ct. No. C1242433)

A jury found defendant James Carothers guilty of possessing child pornography. (Pen. Code, § 311.11, subd. (a).)[1] The trial court granted a five-year term of probation and imposed probation conditions including one year in county jail and the requirement that defendant complete a sex offender management program as mandated by section 1203.067. The court also imposed probation conditions requiring defendant: (1) to waive any privilege against self-incrimination and participate in polygraph examinations as part of the sex offender management program under subdivision (b)(3) of section 1203.067 (subdivision (b)(3)); (2) to waive any psychotherapist/patient privilege to enable communication between the sex offender management professional and the probation officer under subdivision (b)(4) of section 1203.067 (subdivision (b)(4));

[1] Subsequent undesignated statutory references are to the Penal Code.

(3) not to date, socialize with, or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer; (4) not to purchase or possess any pornographic or sexually explicit material as defined by the probation officer; (5) not to enter any social networking sites or post any advertisement, either electronic or written, unless approved by his probation officer; (6) not to frequent, be employed by, or engage in any business where pornographic materials are openly exhibited; and (7) not to possess or use any data encryption technique program.

On appeal, defendant contends the trial court erred by admitting testimony from a prosecution witness recounting the contents of "chat room" discussions found on defendant's computer. He also challenges the constitutionality of the above probation conditions.

We conclude the trial court erred by admitting testimony recounting the chat room discussions found on defendant's computer, but this error was harmless given the overwhelming evidence of defendant's guilt. As to the probation conditions, we conclude that the condition requiring a waiver of the privilege against self-incrimination is prohibited by the Fifth Amendment under *Minnesota v. Murphy* (1984) 465 U.S. 420 (*Murphy*). Second, we construe the waiver of the psychotherapist-patient privilege as requiring waiver only insofar as necessary to enable communication between the probation officer and the psychotherapist. We conclude that the waiver of the psychotherapist-patient privilege as construed in this fashion is not overbroad in violation of defendant's constitutional right to privacy. Third, we hold the condition ordering defendant not to date, socialize or form any romantic relationship with any person who has physical custody of a minor is unconstitutionally vague and overbroad. We will remand to the trial court to consider whether to impose an alternative condition consistent with our reasoning below. Finally, we will order the trial court to insert scienter requirements into the remaining probation conditions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offense*

Defendant shared a two-bedroom house in Campbell with his housemate, Anthony Englehart. They lived in separate bedrooms. In 2011, federal and local law enforcement agents executed a search warrant at the house as part of an investigation into an international child pornography network. Agents seized multiple computers, including computers belonging to both defendant and Englehart. Among other machines, agents found a desktop computer in defendant's bedroom and a laptop in the living room. Defendant identified those two computers as his. He told agents he had exclusive use of his computers and nobody else was authorized to use them. Defendant provided a password to the desktop computer. Agents found several hundred photographic images of child pornography on defendant's computers. They also found a video of child pornography that had been downloaded 33 hours before the warrant search was conducted.

Agents also recovered numerous electronic communications between defendant and others discussing child pornography. Investigators subpoenaed defendant's emails from Comcast and discovered emails between defendant and Shawn McCormack, a producer of child pornography. Agents also found logs of chat room conversations stored on the desktop computer taken from defendant's bedroom. One of the chat room conversations had taken place about three weeks before the warrant search. A participant using the screen name "Witchovarozona" identified his real name as "Jim." The user stated that he was "into images of little toddlers" and expressed an interest in obtaining more images. Agents also found logs of another chat room conversation involving a participant identified as "jameslboluvs." The user discussed his sexual activities in the Campbell area and indicated that having a housemate made his efforts more difficult. The user also discussed trading images with another participant.

Defendant took the stand in his defense. He testified that he had given the password to his Comcast account to Englehart, his housemate. He stated that Englehart had experienced constant problems with his own computer, so defendant allowed Englehart to use defendant's computer dozens of times. Defendant had also allowed Englehart to use the computer in his (defendant's) bedroom. Several months before the warrant search, defendant's hard drive died, so Englehart gave him a used hard drive as a replacement. Defendant installed it in his own computer.

Defendant testified that Englehart's Internet connection was not working on the night before the warrant search. Defendant let Englehart use defendant's computer in defendant's bedroom while defendant slept on the couch. When law enforcement knocked on the door, Englehart said, "Fuck, they're here for me." Defendant testified that he did not recall telling law enforcement agents about his computers or giving them the password.

Defendant denied having any knowledge of the child pornography on his computer. He testified that he had never downloaded or viewed any child pornography. He denied that he sent the emails presented by the prosecution, and he denied engaging in conversations in chat rooms.

B. *Procedural Background*

The prosecution charged defendant with one count of possessing child pornography. (§ 311.11, subd. (a).) Defendant waived his right to a preliminary hearing and the case proceeded to trial in September 2013.

At trial, the prosecution sought to introduce the content of chat room conversations found on defendant's computer through the testimony of Special Agent Todd Schoenberger of the Department of Homeland Security. Without introducing transcripts of the conversations, the prosecution offered to have Agent Schoenberger testify as to what he saw in the digital logs stored on defendant's hard drive. Defendant objected on three grounds: (1) that the evidence had not been authenticated; (2) that the

statements constituted hearsay; and (3) that admission of the testimony would violate the secondary evidence rule (Evid. Code, § 1521).

The trial court overruled defendant's objections and admitted the testimony as an admission of a party opponent. The court also instructed the jury in accord with CALCRIM No. 375 (limiting instruction as to evidence of uncharged offense to prove identity, intent, common plan, etc.).

The jury found defendant guilty as charged. At sentencing, the court granted a five-year term of probation with one year in county jail as a condition of probation. As a further condition of probation, the court ordered defendant to complete a sex offender management program as mandated by section 1203.067, as well as the conditions of probation previously identified.

II. DISCUSSION

A. *Admission of Testimony Regarding the Chat Room Conversations*

Defendant contends the trial court erred by admitting Agent Schoenberger's testimony recounting the contents of the chat room conversations found on defendant's computer. Defendant argues that the prosecution failed to establish their authenticity and that their admission violated the secondary evidence rule set forth in Evidence Code section 1521 et seq. The Attorney General contends the evidence was properly authenticated and that the trial court complied with Evidence Code section 1521. We conclude the trial court erred by admitting oral testimony recounting the chat logs, but we conclude the error was harmless.

1. *Legal Principles*

Evidence Code section 1401 provides, in part: "Authentication of a writing is required before secondary evidence of its content may be received in evidence." (Evid. Code, § 1401, subd. (b).) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided

by law." (Evid. Code, § 1400.) "The means of authenticating a writing are not limited to those specified in the Evidence Code. [Citations.] For example, a writing can be authenticated by circumstantial evidence and by its contents." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187 (*Skiles*).) On appeal, the trial court's receipt of the evidence over defendant's objection is reviewed for abuse of discretion. (*People v. Daugherty* (2011) 199 Cal.App.4th Supp. 1, 6.)

"The content of a writing may be proved by an otherwise admissible original." (Evid. Code, § 1520.) " 'Original' means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. [. . .] If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.' " (Evid. Code, § 255.)

Evidence Code section 1521 provides, in part: "The content of a writing may be proved by otherwise admissible secondary evidence." (Evid. Code, § 1521, subd. (a).) "Once the proponent of the evidence establishes its authenticity, [Evidence Code] section 1521 requires exclusion of secondary evidence only if the court determines: (1) '[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion' or (2) '[a]dmission of the secondary evidence would be unfair.' " (*Skiles, supra*, at p. 1188 [quoting Evid. Code, § 1521, subd. (a)(1) & (2).) However, Evidence Code section 1523 limits the circumstances in which oral testimony may be used to prove the content of a writing. It provides that, generally, "oral testimony is not admissible to prove the content of a writing." (Evid. Code, § 1523, subd. (a).) Evidence Code section 1523 sets forth three exceptions under which oral testimony may be admissible to prove the content of a writing. Two of the exceptions require that the proponent of the evidence not have possession or control of the original writing or any copy of it. (*Id.*, subds. (b) & (c).) Under the third exception, the testimony is not inadmissible "if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

(*Id.*, subd. (d).) The trial court's determination of whether the proponent has satisfied these foundational requirements is reviewed for an abuse of discretion. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069.)

2. *The Trial Court Erred by Admitting Oral Testimony Recounting the Chat Logs*

As an initial matter, we consider whether the underlying evidence constituted a "writing" for the purposes of authentication and the secondary evidence rule. " 'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (Evid. Code, § 250.) Here, the evidence in its "original" form consisted of chat logs stored on defendant's computer—that is, digital files on a hard drive. Such files are analogous to emails and constitute a "means of recording upon [a] tangible thing," as well as a record created of symbols. They are also analogous to computer data stored on magnetic tapes. (See, e.g., *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 798 [data entries on magnetic tapes constituted writings].) Furthermore, because the files constituted "data stored in a computer," "any printout or other output readable by sight" accurately reflecting the contents of the files would constitute an "original" writing. (Evid. Code, § 255.) We conclude the chat log files in digital form constituted original writings under the Evidence Code, as would printouts or video displays of them, had the prosecution offered them as exhibits.

We next consider whether the evidence was properly authenticated under Evidence Code section 1401. "The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what

it purports to be, i.e., that it is genuine for the purpose offered." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.) Here, the prosecution offered the chat logs as admissions by a party opponent—i.e. statements by defendant—as evidence of his sexual predilections. Defendant objected on the ground that the prosecution had not proven he was one of the participants in the chat conversation.

The prosecution presented abundant evidence proving the chat logs were found on the hard drive of defendant's computer. Defendant admitted the computer was his, and he provided his password to the agents who seized it. Furthermore, he told agents he had exclusive use of his computers and nobody else was authorized to use them. The participant in one of the chat conversations identified himself as "jameslboluvs," using defendant's first name and a set of characters extremely similar to defendant's email address ("james1bo@[provider]"). A participant in another conversation identified himself as "Jim" and revealed certain unusual details about his sexual proclivities. Agents discovered physical evidence in defendant's bedroom connecting him to these unusual proclivities. We thus conclude the prosecution presented sufficient circumstantial evidence to show defendant was a participant in the chat room conversations. The trial court did not abuse its discretion by finding the chat log to be authentic.

Finally, we consider whether the court properly admitted Agent Schoenberger's oral testimony recounting the logs. As noted above, while the trial court could have properly admitted a printout of the logs, Evidence Code section 1523 generally excludes oral testimony to prove the content of a writing. The statute sets forth three exceptions to this bar. The Attorney General does not identify any exception under which the testimony could have been admitted. The prosecution made no claim that the state did not have possession or control of the original chat log files, so subsections (b) and (c) of the statute do not apply. Nor did the prosecution make any showing that the logs consisted of "numerous accounts or other writings that cannot be examined in court

without great loss of time" under subsection (d). Accordingly, oral testimony was inadmissible to prove the content of the logs, and the trial court erred by admitting Agent Schoenberger's testimony recounting them.

However, given the overwhelming evidence of defendant's guilt, the error was harmless. Because the trial court erred as a matter of state law only, defendant must show a reasonable probability of a more favorable outcome in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).) Even if the trial court had excluded the testimony recounting the chat logs, the prosecution presented strong evidence to show defendant was in possession of child pornography. The most direct evidence consisted of hundreds of pornographic images and a pornographic video recovered from the hard drive of defendant's computer. Defendant admitted the computer was his, and he provided his password to the agents who seized it. Furthermore, he told agents he had exclusive use of his computers and nobody else was authorized to use them. The prosecution also presented a large number of emails between defendant and a producer of child pornography. Although defendant in his testimony denied any connection to the evidence found on his computer, his testimony was not credible. It is not reasonably probable that a jury would have credited his testimony or otherwise would have ignored the substantial evidence of his guilt if Agent Schoenberger's testimony had been excluded. Accordingly, we conclude the erroneous admission of testimony recounting the chat logs was harmless under *Watson*, *supra*.

B. *Probation Conditions Required Under Section 1203.067*

Defendant challenges the probation conditions imposed under section 1203.067 on three grounds. First, he contends the condition requiring waiver of any privilege against self-incrimination under subdivision (b)(3) violates the Fifth Amendment. Second, he contends the requirement that he undergo polygraph testing as part of the sex offender management program is overbroad as written. Third, he contends the condition requiring waiver of any psychotherapist-patient privilege under subdivision (b)(4) violates his

constitutional right to privacy under both the federal and state constitutions. The Attorney General argues that both waiver conditions are constitutional as worded, and that the polygraph testing requirement is not overbroad.

1. *Statutory Scheme*

Under section 1203.067, subdivision (b)(2), any person placed on formal probation on or after July 1, 2012, for any offense requiring registration under sections 290 through 290.023, "shall successfully complete a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation." Subdivision (b)(3) requires "[w]aiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program." Subdivision (b)(4) requires "[w]aiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09."[2]

The Legislature enacted these provisions in 2010 to amend the Sex Offender Punishment, Control, and Containment Act of 2006 (hereafter, the "Containment Act"). (Stats. 2010, ch. 219, § 17.) The Containment Act created "a standardized, statewide system to identify, assess, monitor and contain known sex offenders for the purpose of reducing the risk of recidivism posed by these offenders, thereby protecting victims and potential victims from future harm." (§ 290.03, subd. (b), Stats. 2006, ch. 337, § 12.) The Containment Act now requires participation in an "approved sex offender management program" certified by the California Sex Offender Management Board (CASOMB). (§ 9003.)

Under section 9003, CASOMB promulgates standards for certification of sex offender management programs and "sex offender management professionals." (§ 9003,

[2] The same two waiver conditions apply to parolees. (§ 3008, subds. (d)(3) & (d)(4).)

subds. (a) & (b).) Such programs "shall include treatment, as specified, and dynamic and future violence risk assessments pursuant to Section 290.09." (§ 9003, subd. (b).) Furthermore, sex offender management programs "shall include polygraph examinations by a certified polygraph examiner, which shall be conducted as needed during the period that the offender is in the sex offender management program." (*Ibid.*)

Section 290.09 specifies that "[t]he certified sex offender management professional shall communicate with the offender's probation officer or parole agent on a regular basis, but at least once a month, about the offender's progress in the program and dynamic risk assessment issues, and shall share pertinent information with the certified polygraph examiner as required." (§ 290.09, subd. (c).) Section 290.09 further requires the sex offender management professional to administer a State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) in two forms—the "SARATSO dynamic tool" and the "SARATSO future violence tool"—and to send the person's scores on these tests to the probation officer. (§ 290.09, subd. (b)(2).) The probation officer must then transmit the scores to the Department of Justice, which makes the scores accessible to law enforcement officials through the Department's website. (*Ibid.*)

2. *Waiver of Any Privilege Against Self-Incrimination*

By requiring the waiver of "any privilege against self-incrimination," the plain language of section 1203.067(b)(3) squarely implicates defendant's rights under the Self-Incrimination Clause of the Fifth Amendment. Furthermore, the "core" right of the Self-Incrimination Clause protects against the use of compelled statements "*in a criminal proceeding* against the person who gave them." (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1128 (*Maldonado*) [citing *Chavez v. Martinez* (2003) 538 U.S. 760, 766-773 (plur. opn. of Thomas, J.) (*Chavez*)], original italics.) Because the statute requires waiver of *any* privilege against self-incrimination, the probation condition necessarily includes a waiver of the "core" right under the Self-Incrimination Clause. The plain language of the waiver, if left intact, would therefore allow the state to use

defendant's compelled statements against him in a separate criminal proceeding. The United States Supreme Court, however, has held that the Fifth Amendment prohibits the state from using a probationer's compelled statements against the probationer in a separate criminal proceeding. (*Murphy*,[3] *supra*, 465 U.S. 420; accord *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073; *United States v. Antelope* (9th Cir. 2005) 395 F.3d 1128.)

Furthermore, the United States Supreme Court has held that a state may not compel a probationer to waive the right to invoke the Fifth Amendment or otherwise punish a probationer for invoking its protections: "Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." (*Murphy*, *supra*, 465 U.S. at p. 438.) This holding is based on the United States Supreme Court's longstanding "penalty cases" jurisprudence, under which the Fifth Amendment prohibits a compelled, prospective waiver of the Fifth Amendment, even prior to and apart from any criminal proceeding. (*Lefkowitz v. Cunningham* (1977) 431 U.S. 801; *Lefkowitz v. Turley* (1973) 414 U.S. 70; *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation* (1968) 392 U.S. 280, 283; *Gardner v. Broderick* (1968) 392 U.S. 273, 276.) More recently, the Supreme Court reaffirmed these principles, and a plurality of the court observed that "[o]nce an immunity waiver is signed, the signatory is unable to assert a Fifth Amendment objection to the subsequent use of his statements in a criminal case, even if his statements were in fact compelled. A waiver of immunity is therefore a prospective waiver of the core self-incrimination right in any subsequent criminal proceeding . . . ." (*Chavez*, *supra*,

[3] *Murphy* referred to "compelled" statements as those compelled over a valid claim of the Fifth Amendment. (*Murphy*, *supra*, 465 U.S. at p. 427.) However, the Fifth Amendment is not "self-executing." (*Id.* at p. 425.) If a probationer does not explicitly invoke the Fifth Amendment, he or she voluntarily waives the privilege against self-incrimination and the statements are not "compelled" within the meaning of the Fifth Amendment. Under these circumstances, the probationer's statements may be used in a criminal prosecution, just as Murphy's statements were used against him.

538 U.S. at p. 768, fn. 2 (plur. opn. of Thomas, J.).) These cases make clear that the probation condition here, by requiring defendant to waive any privilege against self-incrimination, is prohibited under the Fifth Amendment.

Even without the waiver, the state may still compel defendant to participate in treatment—even if doing so requires him to make incriminating statements—provided he retains immunity from the use of compelled statements in separate criminal proceedings. As the court in *Murphy* observed, "a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake,' . . . ." (*Murphy, supra,* 465 U.S. at p. 435, fn. 7.)

The California Supreme Court recently reaffirmed this principle as applied to public employees in *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 (public defender could be compelled under threat of discharge to answer questions over his claim of the privilege provided he retained immunity from prosecution). Our high court held: "In many instances, of course, it is necessary or highly desirable to procure citizens' answers to official questions, including their formal testimony under oath. In such circumstances, an individual's invocation of the privilege against self-incrimination would frustrate legitimate governmental objectives. In light of the competing interests, it is well established that incriminating answers may be officially compelled, without violating the privilege, when the person to be examined receives immunity 'coextensive with the scope of the privilege'—i.e., immunity against both direct and 'derivative' criminal use of the statements. [Citations.] In such cases, *refusals to answer are unjustified*, 'for the grant of immunity has removed the dangers against which the privilege protects. [Citation.]' " (*Id.* at pp. 714-715.) (Italics added.) Furthermore,

where the state's competing interests require it, the state need not issue a formal prospective grant of immunity. (*Id.* at p. 725.)

The state's interests here are at least as great as those in *Spielbauer*. This is particularly so when those interests are balanced against the rights of a probationer, who generally enjoys less constitutional protection than a public employee who is not convicted of any crime. (See *United States v. Knights* (2001) 534 U.S. 112, 119 ["Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' "].) Accordingly, no *formal* grant of immunity is required for the state to pursue incriminating questions.

Under these principles, no waiver of the privilege against self-incrimination is necessary for participation in the sex offender management program. The state may still compel defendant to participate in the program and in polygraph examinations as part of the program, even if doing so requires him to make incriminating statements. (*Murphy, supra,* 465 U.S. at p. 435, fn. 7.) However, if defendant claims the privilege against self-incrimination, and if the state compels incriminating statements from him under threat of penalty, then he retains immunity from the use and derivative use of his statements in any separate criminal proceeding against him.

3. *Overbreadth of the Polygraph Testing Requirement*

Defendant challenges as overbroad the condition requiring him to participate in polygraph examinations as part of the sex offender management program. This general claim was addressed prior to the implementation of the current sex offender management program in *Brown v. Superior Court* (2002) 101 Cal.App.4th 313. The defendant in *Brown* was convicted of stalking. The trial court imposed a probation condition ordering Brown to complete a stalking therapy program and submit to periodic polygraph examinations as conditions of his probation. (*Id.* at pp. 317, 319.) The court of appeal held that mandatory polygraph testing as a condition of probation was reasonably related to the defendant's stalking conviction and to possible future criminality under *People v.*

Lent (1975) 15 Cal.3d 481 (*Lent*). (*Brown*, *supra*, 101 Cal.App.4th at p. 319.) But the court further held that the probation condition must be narrowed under *Lent* to "limit the questions allowed to those relating to the successful completion of the stalking therapy program and the crime of which Brown was convicted." (*Id.* at p. 321.)

Application of the *Lent* factors here leads us to the same conclusion. Under *Lent*, "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Lent*, *supra*, 15 Cal.3d at p. 486, fn. omitted.) Here, the basic requirement that defendant participate in polygraph examinations does not run afoul of the *Lent* factors, provided the questions posed to him are reasonably related to his successful completion of the sex offender management program, the crime of which he was convicted, or related criminal behavior, whether past or future. The CASOMB regulations provide examples of many such questions. For example, questions about the probationer's sexual pre-occupations or history of sexual deviance would be reasonably related to future criminality and the circumstances of the underlying offense.

However, neither the language of the probation condition nor the CASOMB regulations place any limits on the types of questions that may be posed to the probationer. There is no requirement that the questions be related to any criminal conduct, whether past, present, or future. Nor is there any requirement that the questions be limited to successful completion of the sex offender management program. Under the probation condition imposed here, a polygraph examiner could ask defendant anything at all, without limitation. For example, a polygraph examiner could question defendant about his medical history or personal financial matters having nothing to do with any

criminal conduct. Such questions would have no reasonable connection to the crime for which he was convicted, no bearing on his completion of the treatment program, and no relevance to future criminality. Under the *Lent* factors, allowing such questions would violate overbreadth principles.

Because the language of subdivision (b)(3) mandates that participation in polygraph examinations "shall be part of the sex offender management program," we will construe this latter condition as imposing the limitations required under *Lent* and *Brown*. Specifically, we construe the requirement of participation in polygraph examinations as allowing only questions relating to the successful completion of the sex offender management program, the crime of which defendant was convicted, or related criminal behavior. So construed, we uphold this probation condition as sufficiently narrow to satisfy the overbreadth requirements of *Lent*.

4. *Waiver of the Psychotherapist-Patient Privilege*

The California Supreme Court has recognized that communications between a patient and psychotherapist are protected by a psychotherapist-patient privilege based on the federal constitutional right to privacy. "The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511 (*Stritzinger*).) Our high court has also said: "We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut* [(1965)] 381 U.S. 479, 484, the United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone." (*In re Lifschutz* (1970) 2 Cal.3d 415, 431-432 (*Lifschutz*).)

More recently, the California Supreme Court has questioned the continuing vitality of the constitutional bases for the psychotherapist-patient privilege. "Although

over 40 years have elapsed since our decision in *Lifschutz*, the United States Supreme Court itself has not yet definitively determined whether the federal Constitution embodies even a *general* right of informational privacy." (*People v. Gonzales* (2013) 56 Cal.4th 353, 384 (*Gonzales*).) Following the lead of the United States Supreme Court in *Whalen v. Roe* (1977) 429 U.S. 589 and *NASA v. Nelson* (2011) 562 U.S. 134, our high court in *Gonzales* merely assumed, without deciding, that such a right exists. (*Gonzales, supra,* 56 Cal.4th at p. 385.) Regardless of the analytic approach taken by these courts, no court has yet overruled the holdings of *Lifschutz* and *Stritzinger*. We remain bound by them. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Accordingly, we will proceed under the assumption that defendant enjoys the right to a psychotherapist-patient privilege based on his federal constitutional privacy rights.

"It is also well established, however, that the right to privacy is not absolute, but may yield in the furtherance of compelling state interests." (*Stritzinger, supra,* 34 Cal.3d at p. 511.) In *Stritzinger*, the court began by considering the state's "competing interest" in creating an exception to the privilege. (*Ibid.*) The court reaffirmed the holding of *Lifschutz* that any such exception must be narrowly construed, *ibid.*, "concomitant with the purposes of the exception." (*Lifschutz, supra,* 2 Cal.3d at p. 435.) These principles resemble the tailoring analysis in which a court considers whether a probation condition imposing limitations on a person's constitutional rights is closely tailored to the purpose of the condition. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

In *Gonzales, supra,* 56 Cal.4th 353, the California Supreme Court recently considered the psychotherapist-patient privilege in the context of a proceeding under the Sexually Violent Predator Act (SVPA). The defendant, Ramiro Gonzales, had been convicted of multiple sex offenses over a 20-year period. (*Id.* at p. 358.) Gonzales was paroled in 2004 and he underwent psychological evaluation and treatment as a condition of parole. (*Id.* at p. 359.) After violating his parole conditions several times—including

one incident in which he visited a children's playground—Gonzales was arrested and taken into custody. (*Id.* at pp. 359-360.) In 2006, the prosecution petitioned to commit Gonzales under the SVPA, and the matter was set for a jury trial.

Before trial, the prosecution sought to subpoena psychological records arising out of Gonzales' psychological treatment as a parolee. (*Gonzales*, *supra*, 56 Cal.4th at p. 361.) Gonzales moved to quash the subpoena on the basis the records were protected under the psychotherapist-patient privilege, partly relying on *Story v. Superior Court* (2003) 109 Cal.App.4th 1007 (*Story*) [psychotherapy records relating to therapy sessions engaged in as a condition of probation were protected by the statutory psychotherapist-patient privilege and could not be obtained by a prosecutor who sought the records for use in a subsequent murder prosecution].) The California Supreme Court distinguished between Gonzales' statutory claim under *Story* and his claim under the federal constitutional right to privacy: "[W]e believe that in order to properly distinguish the federal constitutional issue from the state law issue, it is necessary, in determining whether the disclosure of defendant's therapy records and the admission of his therapist's testimony violated a federal constitutional right of privacy, to look to the specific nature and extent of the federal constitutional privacy interests that are actually implicated in this particular setting and to the permissible state law interests that would support the disclosure and admission of testimony in question in such a setting." (*Gonzales*, *supra*, 56 Cal.4th at p. 386.)

In its analysis, the court first noted that the constitutional privacy right invoked by Gonzales arose under the conditions of parole, and under the care of a psychotherapist funded by the state. (*Gonzales*, *supra*, 56 Cal.4th at p. 386.) The court then observed that "the federal Constitution grants states considerable leeway to impose very substantial limitations on the right of privacy retained by persons who are released on parole," citing *Samson v. California* (2006) 547 U.S. 843 (federal Constitution does not preclude a state from authorizing a search of a parolee at any time or place even in the absence of

reasonable suspicion). Balanced against this "limited intrusion" of the privacy right at issue, the court held that "the state has a particularly strong and legitimate interest in authorizing the disclosure and use of a parolee's prior statements that occur in parole-mandated therapy in a subsequent SVPA proceeding, especially when, as here, the parole-mandated therapy was occasioned by the parolee's prior conviction of a sex offense." (*Gonzales*, *supra*, 56 Cal.4th at pp. 387-388.) The court held disclosure was therefore supported by "a legitimate and substantial state interest," such that Gonzales' federal constitutional right to the psychotherapist-patient privilege was not violated by the release of his psychological records. (*Id.* at p. 388.)

Consistent with the above principles, we have considered the purpose of the waiver of the psychotherapist-patient privilege at issue here and the state's interest in compelling disclosure under it. Unlike the language of subdivision (b)(3), which mandates waiver of any privilege against self-incrimination, the wording of subdivision (b)(4) explicitly sets forth the purposes of the waiver of the psychotherapist-patient privilege: "to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09." Section 290.09, in turn, requires communication between the sex offender management professional and the probation officer for two purposes. First, the sex offender management professional must provide the supervising probation officer with the probationer's scores on the SARATSO risk assessment tools. (§ 290.09, subd. (b)(2).) Second, the sex offender management professional must communicate with the probation officer about the probationer's "progress in the program and dynamic risk assessment issues." (§ 290.09, subd. (c).) By these provisions, the purposes of the psychotherapist-patient privilege waiver are expressly limited and comparatively well defined.

We find that the state's interest in furthering such communication is legitimate and substantial. The overriding goal of the Containment Model approach underlying the sex offender management program is public safety and the reduction of recidivism. The

functioning of the model hinges in large part on open communication between the probation officer and the psychotherapist. (Cal. Sex Offender Management Bd., Sex Offender Treatment Program Certification Requirements, at pp. 6-8.)[4] Furthermore, probationers, like the parolee in *Gonzales*, are inherently subject to a greater degree of intrusion on their rights of privacy. (*United States v. Knights*, *supra,* 534 U.S. at p. 119.) Accordingly, we conclude the state has a sufficiently substantial interest in communication between these participants to justify disclosure here.

We next consider whether the scope of the waiver is properly tailored to this interest, or whether the waiver must be more narrowly construed concomitant with the purposes of the exception. (*Stritzinger*, *supra,* 34 Cal.3d at p. 511; *Lifschutz, supra,* 2 Cal.3d at p. 435; *In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Similar to the broad language used in the waiver of the privilege against self-incrimination, the language of the statute, read literally, requires the waiver of "*any* psychotherapist-patient privilege," regardless of the subject matter of the communication or the level of risk to public safety absent disclosure. The waiver does not distinguish between comparatively more dangerous or less dangerous probationers. But unlike the language of the waiver of the privilege against self-incrimination, this broad language is followed by the phrase: "to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09." This additional language limits what may be done with the probationer's communications once they are revealed.

We will therefore narrowly construe the statute as requiring a waiver of the psychotherapist-patient privilege only insofar as it is necessary "to enable communication between the sex offender management professional and supervising probation

[4] This document is online at: <http://www.cce.csus.edu/portal/admin/handouts/CASOMB Program 10-29-13 complete.pdf> [July 31, 2015]. We take judicial notice of these materials. (Evid. Code, §§ 452, 459.)

officer . . . ." (§ 1203.067, subd. (b)(4).) Specifically, we hold that defendant may constitutionally be required to waive the psychotherapist-patient privilege only to the extent necessary to allow the sex offender management professional to communicate with the supervising probation officer. Furthermore, the supervising probation officer may communicate defendant's scores on the SARATSO risk assessment tools to the Department of Justice to be made accessible to law enforcement as required under section 290.09, subdivision (b)(2). This narrow interpretation of the statute allows the psychotherapist to communicate with the probation officer as necessary, furthering the purposes of the exception as set forth in the statute. Apart from these exceptions, neither the psychotherapist nor the probation officer may relay protected communications to some other third party under the waiver, and defendant's privacy rights based on the psychotherapist-patient privilege otherwise remain intact.

Defendant further contends the waiver requirement violates his right to privacy under the California Constitution and Evidence Code section 1014. We agree with defendant that the right to privacy under the California Constitution protects the confidentiality of communications between the psychotherapist and the patient. (Cal. Const, art. I, § 1; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440; *Scull v. Superior Court* (1988) 206 Cal.App.3d 784, 790.) We further agree that the waiver language of subdivision (b)(4), if not narrowly construed, would violate defendant's right to privacy under the state constitution. However, "[p]rivacy concerns are not absolute; they must be balanced against other important interests." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37.) For the reasons set forth above in Section II.B.4 regarding the federal constitutional right to privacy, we conclude that the waiver provision as narrowly construed in that section reflects a proper balance between defendant's privacy concerns and the interests of the state. Accordingly, we conclude the waiver as so construed is constitutional under Article 1, Section 1 of the California Constitution.

As to the statutory psychotherapist-patient privilege under Evidence Code section 1014, to the extent the statute conflicts with the waiver requirement, it is the later, more specific statute that controls. (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1550, quoting *Young v. Haines* (1986) 41 Cal.3d 883, 894; *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.) Because the Legislature enacted subdivision (b)(4) after it enacted Evidence Code section 1014, and because the former is more specific than the latter, we conclude the waiver requirement supersedes the evidentiary privilege. (Stats. 2010, ch. 219, § 17; Stats. 1994, ch. 1010, § 106.)

C. *Prohibition on Dating, Socializing, or Forming a Romantic Relationship With Any Person Who Has Physical Custody of a Minor*

Defendant challenges the condition requiring him not to "date, socialize [with], or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer." Defendant argues that this condition is unconstitutionally vague and overbroad in violation of his rights to freedom of association and privacy under the Fourteenth Amendment. He also contends the requirement that he not "socialize," "date," or "form a romantic relationship" with another person is unconstitutionally vague. The Attorney General concedes that the term "socialize" is vague. She argues we should strike that term and uphold the remaining terms of the condition. We agree with defendant that the requirement is both overbroad and vague, and we will order the trial court to strike the condition.

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K., supra*, 40 Cal.4th at p. 890.) In other words, "where an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, ' "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." ' " (*People v. Bauer*

(1989) 211 Cal.App.3d 937, 942.) All other probation conditions are reviewed for abuse of discretion. "In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) An abuse of discretion does not occurs unless the probation condition " ' "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

The United States Supreme Court has long recognized a constitutional right to freedom of association. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 617.) Included in this right is the "freedom of intimate association," which is exemplified by those personal affiliations that "attend the creation and sustenance of a family—marriage [citation]; childbirth [citation]; the raising and education of children [citation]; and cohabitation with one's relatives [citation]." (*Id.* at p. 619; *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 624.) By restricting defendant's freedom to date and form romantic relationships with other persons, the probation condition implicates his freedom of intimate association. We must therefore consider whether the condition is "narrowly tailored" to the state's interest in reformation and rehabilitation. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The Ninth Circuit Court of Appeals considered a similar probation condition in *United States v. Wolf Child* (9th Cir. 2012) 699 F.3d 1082 (*Wolf Child*). Wolf Child pleaded guilty to attempted sexual abuse after attempting to have sex with an intoxicated and unconscious 16-year-old girl. (*Id.* at p. 1088.) The sentencing court ordered Wolf Child not to " 'date or socialize with anybody who has children under the age of 18' " without prior approval from his probation officer. (*Id.* at p. 1089.) The court of appeals concluded that this condition was overbroad in violation of the defendant's right to freedom of association. (*Id.* at p. 1100.) In its reasoning, the court observed: "The

category of people covered by this condition with whom [the defendant] is prohibited from establishing social relationships is enormous. Probably more than half the people in the United States would be on the 'do not associate' list." (*Id.* at pp. 1100-1101.) Off-limit persons included coworkers, bosses, family members, friends, spiritual leaders, and neighbors who have children. (*Id.* at p. 1101.) The court thereby found the scope of this prohibition to be overly broad.

We find the court's reasoning in *Wolf Child* persuasive. Like the probation condition in that case, the restriction here prohibits defendant from socializing with an extremely large category of persons unless he first obtains permission from his probation officer. People who have custody of minors are ubiquitous, and would likely be present among defendant's coworkers, friends, family members, neighbors, and fellow church members. The condition prohibits defendant from socializing with them regardless of whether he has any contact with their children. For example, defendant would be prohibited from socializing with coworkers—and possibly prevented from even holding a job—even though there may be little or no chance of meeting his coworkers' children. Furthermore, socialization among coworkers and others is likely to be so frequent that it would be impractical for defendant to obtain his probation officer's approval prior to every such incident. The enormous scope of the condition thereby impinges on defendant's freedom far more broadly than necessary to serve the state's interests and the purposes of the condition.

We also agree that the term "socialize" is unconstitutionally vague in this context. "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*In re Sheena K., supra*, 40 Cal.4th at p. 890.) "The vagueness doctrine ' "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men [or women] of common intelligence must necessarily guess at its meaning and differ as to its application.' " [Citations.]' " (*Ibid.*) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him [or her],

and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Ibid.*)

We would agree that much incidental contact—such as waving or saying "hello" to a stranger—does not constitute socializing. But that does not sufficiently clarify or narrow the scope of the condition. As relevant here, the dictionary defines "socialize" as "enter into or maintain personal relationships with others." (Webster's 3d New Internat. Dict. (1993) p. 2162.) Under this definition, a reasonable person cannot determine with sufficient precision what conduct constitutes "socializing," i.e., entrance into a personal relationship. If defendant briefly meets with a group of coworkers while working on a project at his job, is he "socializing" with them? What if he attends the meeting passively, without talking? Or if he talks, but only says a few words? Has he formed a personal relationship with any of his coworkers under these circumstances? The answers to these questions are insufficiently clear for the purposes of enforcing a probation condition. We conclude that the term "socialize" is too ambiguous for a reasonable probationer to know with sufficient precision what conduct is prohibited.

The same is true of the requirement that defendant not "date" or "form a romantic relationship" with persons having custody of a minor. It is unclear what conduct constitutes a "date." Furthermore, it is possible for a probationer to engage in these activities without coming into contact with the minors the condition seeks to protect. Thus, these conditions impinge directly on defendant's right of association, yet they only indirectly serve the stated interest. Much less restrictive and more narrowly targeted conditions are available for the same purposes, e.g., a requirement that defendant not be present in the same room with a minor absent adult supervision.

Because the condition is both overbroad and vague, we will reverse and remand to the trial court to consider imposing a probation condition that is more "sufficiently precise" and "closely tailor[ed]" to the purpose of protecting minors in defendant's presence. (*In re Sheena K., supra,* 40 Cal.4th at p. 890.)

D. *Prohibition on Purchasing or Possessing Pornography*

Defendant contends the condition that he "shall not purchase or possess any pornographic or sexually explicit material as defined by the probation officer" is unconstitutionally vague, and must therefore be modified. The Attorney General concedes that the condition as written must be modified in accord with the holding of this court in *People v. Pirali* (2013) 217 Cal.App.4th 1341,1351 (*Pirali*). We accept the concession.

In *Pirali*, this court considered a probation condition ordering Pirali " 'not to purchase or possess any pornographic or sexually explicit material as defined by the probation officer.' " (*Pirali, supra*, 217 Cal.App.4th at p. 1344.) The court held: "Materials deemed explicit or pornographic, as defined by the probation officer, is an inherently subjective standard that would not provide defendant with sufficient notice of what items are prohibited." (*Id.* at p. 1353.) Accordingly, the court modified the condition to order Pirali " 'not to purchase or possess any pornographic or sexually explicit material, having been informed by the probation officer that such items are pornographic or sexually explicit.' " (*Ibid.*) We agree with the reasoning of *Pirali*, and we will order the trial court to modify the condition accordingly.

E. *The Condition That Defendant Not Enter Any Social Networking Sites or Post Any Advertisement*

Defendant challenges the condition requiring him not to enter any social networking sites or post any advertisement, either electronic or written, unless approved by his probation officer. He contends the condition is unconstitutionally vague in the absence of a scienter requirement because it is possible he could unknowingly enter a social networking site by accidentally clicking on a link taking him to such a site. The Attorney General agrees that a scienter requirement is necessary. Consistent with *Pirali, supra*, 217 Cal.App.4th at pages 1350-1351, we will order the trial court to modify the condition to include a scienter requirement.

F. *Condition That Defendant Must Not "Frequent" Any Business Where Pornography Is Openly Exhibited*

Defendant challenges the condition requiring him not to "frequent, be employed by, or engage in any business where pornographic materials are openly exhibited." He contends the condition is vague in the absence of a scienter requirement, and that the term "frequent" must be modified to be "visit or remain." The Attorney General concedes this issue and proposes to modify the condition to include a scienter requirement. We accept the concession.

We agree with defendant that the term "frequent" is unconstitutionally vague, as this court has previously held. (*People v. Leon* (2010) 181 Cal.App.4th 943, 952 (*Leon*) [term "frequent" is unconstitutionally vague]; *In re H.C.* (2009) 175 Cal.App.4th 1067, 1072 [term "frequent" is obscure and susceptible to multiple meanings].) Consistent with this court's modification of the term in *Leon*, we substitute the phrase "visit or remain in" for the term "frequent." Furthermore, because defendant could visit a business without knowing that prohibited materials are openly exhibited, we will order the trial court to modify the condition to incorporate a scienter requirement.

G. *Prohibition on Possession or Use of Any Data Encryption Technique Program*

Defendant challenges the probation condition prohibiting him from "possess[ing] or [using] any data encryption technique program." He contends the condition is unconstitutionally vague in the absence of a scienter requirement. The Attorney General concedes that the condition must be modified to require that defendant not knowingly possess or use any data encryption technique program.

We agree the condition is impermissibly vague in the absence of a scienter requirement. Accordingly, we will accept the Attorney General's concession and will order the trial court to modify the condition.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with the following instructions. First, in light of our holding that the waiver requirement in section 1203.067, subdivision (b)(3) is unconstitutional, the trial court shall strike the language "waive any privilege against self-incrimination and" from the probation condition implementing that subdivision. Second, the trial court shall strike the probation condition ordering defendant "not to date, socialize or form any romantic relationship with any person who has physical custody of a minor unless approved by the probation officer," and the court shall consider whether to impose a probation condition consistent with our reasoning above. Third, the trial court shall modify the following probation conditions: (1) the condition prohibiting purchase or possession of pornographic or sexually explicit materials shall be modified to state that defendant shall not purchase or possess any pornographic or sexually explicit material, having been informed by the probation officer that such items are pornographic or sexually explicit; (2) the condition prohibiting defendant from entering any social networking site or posting any advertisement shall be modified to state that defendant shall not knowingly enter any social networking sites or post any advertisements, either electronic or written, unless approved by the probation officer; (3) the condition that defendant not frequent, be employed by, or engage in any business where pornographic materials are openly exhibited shall be modified to state that defendant shall not knowingly visit or remain in, be employed by, or engage in, any business where pornographic materials are openly exhibited; and (4) the condition prohibiting possession or use of data encryption technique programs shall be modified to state that defendant shall not knowingly possess or use any data encryption technique program.

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MÁRQUEZ, J.

I CONCUR:

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WALSH, J.[*]

[*]Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

RUSHING, P.J., Concurring

I agree with the majority opinion that defendant cannot be compelled to waive his immunity against self-incrimination, although he can be compelled to answer potentially incriminating questions, on pain of revocation of probation, so long as his answers cannot be used against him. I diverge somewhat from the majority opinion's approach, however, concerning the effect of defendant's statutorily required waiver of the psychotherapist-patient privilege. I believe California's express guarantee of the right of privacy (Cal. Const., art. I, § 1) compels a rule under which the waiver required by Penal Code section 1203.067, subdivision (b), permits the "sex offender management professional" to report to the probation officer upon the defendant's test scores, attendance, and general cooperativeness in the therapy process, but does not otherwise permit the professional to disclose, to the probation officer or anyone else, the content of any otherwise protected psychotherapeutic communications. To the extent Penal Code section 1203.067 may be understood or intended to require or permit disclosure of such communications, I would hold it violative of our state constitutional guarantee of privacy.

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RUSHING, P.J.